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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 152

LUCAS COUNTY FARM BUREAU COOPERATIVE ASSOCIATION, MONCLOVA ROAD, MAUMEE, OHIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Petitioner, Lucas County Farm Bureau Cooperative Association, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on May 10, 1961.

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board (App. p. 127a)[1] is reported 128 NLRB

[1] This reference and others like it appearing herein are to the appendix filed as a joint appendix in the court below, nine copies of which have been filed in this court in accordance with Rule 21. All reference appearing herein are to this joint appendix unless otherwise specifically identified as references to the appendix of this petition.

(No. 56). The opinion of the Court of Appeals for the Sixth Circuit (App. this petition p. 1a) is reported at 42 L.C. Sec. 16,935.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on May 10, 1961 (Cert. R. p. 136), and copies thereof are appended to this petition in the Appendix at pp. 4a and 5a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the National Labor Relations Act grants jurisdiction to the National Labor Relations Board over the business of Petitioner, a farmer's county cooperative association?

Whether Congress in the passage of the National Labor Relations Act intended to grant to the National Labor Relations Board jurisdiction over businesses formed by and furnishing services directly to farmers and directly concerned with the Agricultural Economy as distinguished from the Industrial Economy of the United States?

Whether the Sixth Circuit Court of Appeals can base its judgment of jurisdiction under the National Labor Relations Act over Petitioner's business on conclusions of fact not found by the National Labor Relations Board as the basis of its jurisdiction?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

This case involves construction of the National Labor Relations Act, Title 29, U.S.C., Sections 151-166, initially passed July 5, 1935, c. 372, 49 Stat. 449; amended

June 23, 1947, c. 120, Title I, Sec. 101, 61 Stat. 136, Act of October 22, 1951, c. 534, 65 Stat. 601, Act of August 28, 1958, Public Law No. 85-791, 72 Stat. 941, and Act of September 14, 1959, 86th Cong., 1st Sess., Public Law No. 86-257, U.S. Code, Title 29, Sections 151-167, pertinent portions of which are as follows:

> "An Act to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> Findings and policies.—Section 1. The denial by (some) employers of the right of employees to organize and the refusal by (some) employers to accept the procedure of collective bargaining lead to strikes and other forms of *industrial strife or unrest*, which have the intent or the necessary effect of burdening or obstructing commerce * * *.[1]
>
> The inequality of bargaining power between employees * * * and employers * * * substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of *wage earners in industry* and by preventing the stabilization of competitive wage rates and working conditions within and between *industries*.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of *industrial strife and unrest*, by en-

[1] Words in parenthesis added by Labor Management Relations Act of 1947 or commonly known as the Taft-Hartley Act. P. L. 101, 1st Session, 80th Congress.

couraging practices fundamental to the friendly adjustment of industrial disputes * * * by restoring equality of bargaining power between employers and employees."

"Definitions. Sec. 2. When used in this Act—

(1) The term 'person' includes one or more individuals, (labor organization), partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.[1]

(2) The term 'employer' includes any person acting (as an agent of an employer,) directly, or indirectly, but shall not include the United States (or any wholly owned Government corporation, or any Federal Reserve Bank,) or any State or political subdivision thereof, (or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual,) or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization other than when acting as an employer, or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but *shall not include any individual employed as an agricultural laborer*, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, (or any individual having the

[1] Words in parenthesis added by Labor Management Relations Act of 1947 or commonly known as the Taft-Hartley Act. P. L. 101, 1st Session, 80th Congress.

status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.")[1]

STATEMENT OF FACTS

The Lucas County Farm Bureau Cooperative Association is a farmers non-profit county cooperative association organized pursuant to Ohio law in 1934. It operates in Lucas County, Ohio, three branches; one at Maumee, Ohio, one at Curtice, Ohio and one at Berkey, Ohio. (Appendix pages 48a-50a)

At the Berkey, Ohio branch, there is a small grain elevator in connection with a grain mill and store. At the other branches there are just the grain mill and stores where farmers' supplies are sold. (App. pp. 48a-49a)

At the mills the Petitioner processes grain for farmers. They offer the following two services through the mills to the farmers.

1. Mixing of feed; a process of putting it through a hammer mill, then into a feed mixer and adding supplements to it. The feed is then returned to the farmer in his own bags and he takes it home. This is a service to the farmer members for which the Petitioner is paid ten cents (10¢) for one hundred (100) pounds. (App. pp. 70a-72a)

2. Cleaning and treating seed; a process that takes all material like straw and foreign matter out of the seed. The seed is also treated by chemicals if desired

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[1] Words in parenthesis added by Labor Management Relations Act of 1947 or commonly known as the Taft-Hartley Act. P. L. 101, 1st Session, 80th Congress.

by the farmer. Again, it is bagged and returned to the farmer; none of it is sold by the co-op. Again, it is a service for the farmer. (App. pp. 70a-72a)

Insofar as its store sales are concerned, Petitioner is under rigid restrictions governing its sales and to whom it can sell supplies and merchandise. As Deloy Sattler testified, these restrictions are as follows:

1. Fifty-one per cent (51%) of the sales by Petitioner must be made to members of the Lucas County Farm Bureau Cooperative Association; that is, to members who own voting stock.

2. Eighty-five per cent (85%) of the total sales must be to eligible farm people, i.e., people who are eligible to become voting members; that is, agricultural producers.

The business of Petitioner consists of grinding and mixing feed, seed cleaning and treating for farmers in the area and the selling of feed, seed fertilizer, spray materials, farm and home supplies. In addition, at the Berkey plant the Petitioner purchases grain from farmers and the Petitioner, due to the limited capacity of the elevator, also offers farmer members the privilege of selling their grain to the Michigan Elevator Exchange through Petitioner's membership in the Michigan Elevator Exchange. (App. pp. 69a-70a)

At all times material herein the Petitioner had a grand total of twenty-two (22) employees at these three branches, including Deloy Sattler, County Manager, three (3) branch managers and four (4) clerical employees. (App. pp. 49a, 65a)

On January 21, 1959, Local 58 of the American Federation of Grain Millers, AFL-CIO, filed its peti-

tion for certification of representatives of the Petitioner with the NLRB seeking to become the representative for collective bargaining purposes for some twelve (12) employees. (App. pp. 11a-14a, 103a) Notice of the representation hearing was duly issued and a hearing was had in the Lucas County Court House, Toledo, Ohio, on February 25, 1959. (App. pp. 42a et seq.) At this hearing the Petitioner appeared, represented by counsel, and objected to the jurisdiction of the NLRB under the NLRA over the Petitioner's business. (App. pp. 44a-45a)

On April 7, 1959, based on the evidence adduced at the hearing and after submission of briefs, the NLRB issued their decision determining and holding that the Petitioner's business was a "retail business", that the NLRB's so-called "retail yard sticks" were met by the proof and that Petitioner was engaged "in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein." (App. pp. 15a-16a, 103a-104a)

The NLRB also ordered an election and determined and defined a unit for appropriate collective bargaining purposes. (App. pp. 16a-17a, 104a)

Subsequent to said order, on May 12, 1959 a mail election (App. p. 105a) was held at Petitioner's place of business without notification to or consultation with counsel for Petitioner by the NLRB or any of its agents. The signature of Petitioner's County Manager, Deloy Sattler, was obtained to a document called "certification to conduct of election" and to another document called "tally of ballots" (App. pp. 18a-20a) without submission of these documents to Petitioner's counsel for examination and without Petitioner's

manager having the benefit of counsel's advice in connection with the same. (App. pp. 19a-20a)

On May 18, 1959, Petitioner made timely protests and objections to the conduct of the election urging irregularity in connection with the conduct of the election in the above details and that the effect of the same was that Petitioner had been deprived of the opportunity of legal advice affecting their legal rights in connection with the conduct of said election. (App. pp. 19a-20a, 106a)

On May 28, 1959, the Regional Director, Philip Fusco, made his report on the objections of Petitioner to the election holding that no irregularity had occurred that would warrant setting the election aside. (App. pp. 20a-22a, 106a)

The Petitioner, pursuant to an extension of time granted by the Board to Petitioner to file said exceptions by June 17, 1959 (App. pp. 24a-26a), on June 16, 1959 filed its exception to the report of the Regional Director on the Objections to the Election (App. p. 2a)

On June 22, 1959 the NLRB issued its Supplemental Decision and Certification of Representatives adopting the recommendations of the Regional Director and stating, "no timely exceptions were filed to the Regional Director's report by any of the parties by the time provided therefor." (App. pp. 27a-28a, 106a, 107a)

On June 24, 1959 Petitioner filed a Motion for Vacation of the Supplemental Decision and Certification of Representatives and for Reconsideration of its Exceptions to the Report on Objections to the Conduct of the Election taking issue with the statement in the supplemental decision of the NLRB, quoted above, to the

effect that no timely exceptions were filed. (App. pp. 29a-31a) By letter dated June 29, 1959, signed by George A. Leet, Assistant Executive Secretary of the NLRB, Petitioner was informed that its request for vacation and reconsideration was denied. (App. pp. 32a, 107a)

Immediately following the supplemental decision and certification of representatives, the representative of Local 58 requested, by letter dated June 25, 1959, (App. p. 32a) a negotiating meeting with the Farm Bureau Co-op. He was informed of the filing of the motion to vacate and for a reconsideration of this decision by letter dated June 26, 1959, (App. p. 33a) and further informed that the Farm Bureau was not disposed to negotiate until the matter was finally dispose of before the Board. (App. p. 34a)

On July 3, 1959, by letter addressed to Mr. Deloy Sattler, Manager, the request of the Union was repeated (App. p. 34) and on July 6, 1959 Mr. Fred Kunz, President and Business Representative of Local 58, was advised that Mr. Sattler was on vacation and was not expected back for a week or ten days, but that the request would be brought to his attention upon his return. (App. p. 35a)

On July 20, 1959 Fred Kunz, President and Business Representative of Local 58, filed an unfair labor charge against the Petitioner claiming a refusal to meet and bargain with them, among other things. This charge was referred to counsel for answer and by letter dated July 28, 1959 Mr. Philip Fusco, Regional Director of the NLRB in Cleveland, Ohio, was informed of the filing of the suit in the Federal Court hereinafter referred to. He was further informed that Mr. Kunz

had been informed in connection with his request for a meeting that the Board of Directors of the Farm Bureau were meeting July 23, 1959 and were going to decide to recognize the certification or seek judicial determination of their constitutional and legal rights. (App. p. 111a)

On July 27, 1959 Petitioner filed a complaint in the United States District Court for the Northern District of Ohio, Western Division, against the NLRB and Local 58, American Federation of Grain Millers, AFL-CIO, asserting that its constitutional and legal rights had been violated in the proceedings before the NLRB and that the NLRB had, by its orders and actions, exceeded its powers granted it in the NLRA. (App. p. 112a) The Union representative was notified of the filing of this action which questioned the jurisdiction of the NLRB over the Petitioner's business and was informed both orally and in writing that the company was not disposed to negotiate with the Union until the matter of the NLRB jurisdiction had been determined by the courts, by letter dated September 3, 1959. (App. pp. 108a, 112a, 114a)

An amended charge against Petitioner was filed on September 2, 1959 by the representative of Local 58 alleging different dates than were alleged in the previous charge. This charge was answered in writing on behalf of petitioner by counsel on September 15, 1959 by making reference to the previous communique to Mr. Fusco dated July 28, 1959 advising of the filing of the action in the Federal Court and their decision not to negotiate pending this action for fear of prejudicing their rights therein. (App. pp. 114a-115a)

On September 16, 1959 a complaint and notice of hearing was issued against Petitioner setting a hearing

for December 1, 1959. Petitioner filed its answer thereto on September 23, 1959. On September 25, 1959 in the action pending in the United States District Court for the Northern District of Ohio, Western Division, the NLRB by its counsel filed a motion to dismiss the complaint or in the alternative to grant summary judgment in the defendant's favor. (App. pp. 6a-9a, 108a)

On November 19, 1959 an amendment to the unfair labor charge was issued. On November 24, 1959 Petitioner filed in the United States District Court for the Northern District of Ohio, Western Division, a motion for injunction pendente lite asserting that an unfair labor complaint had been filed against it and had been set for hearing on December 1, 1959 and that unless an injunction was issued against the NLRB, Petitioner would be deprived of its right to a judicial determination of the question of jurisdiction of the NLRB over its business as asserted in the complaint on file.

The United States District Court, Toledo, Ohio, set this injunction for hearing on November 27, 1959 and at the same time set for hearing the motion of the NLRB to dismiss the complaint and/or for summary judgment. At this hearing the Federal Court ruled that it was without power or authority to review the validity or legality of the proceedings of the NLRB and further that it was without personal jurisdiction over the defendant members of the NLRB. Petitioner's complaint was dismissed and motion for injunction denied. This order was entered effective December 15, 1959. (App. p. 108a)

On December 1, 1959 a hearing on the unfair labor charge was held in the Lucas County Court House,

Toledo, Ohio. (App. p. 74a) On March 22, 1960 the Trial Examiner, who was in charge of the hearing, issued his report.

On March 25, 1960 Petitioner filed its exceptions to the intermediate report of the Trial Examiner with the Board and requested an oral argument. (App. pp. 3a, 127a)

On August 5, 1960 the NLRB announced its decision in favor of Local 58, finding that it had jurisdiction over the business of the Petitioner and that the Petitioner had been guilty of an unfair labor charge in failing to negotiate and bargain with the Union and it denied the request of Petitioner's counsel for oral argument. (App. pp. 127a-130a)

On September 10, 1960, Petitioner filed its petition in the Sixth Circuit Court of Appeals for review of the decision and order of the NLRB. (App. pp. 131a-133a)

On April 13, 1961, this case was argued by Petitioner's counsel before the Sixth Circuit Court of Appeals. On May 10, 1961, the Court announced its decision denying the petition to set aside the Board's order and directing enforcement of the same and entered its decree accordingly. (App. this petition, page 1a)

On motion of Petitioners, the mandate of the Sixth Circuit Court of Appeals has been stayed until June 29, 1961, pending filing an application for a writ of certiorari herein.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of federal law which has not been, but should be settled by this Court

The decision below should be reviewed because it represents an application of the National Labor Relations Act to an area of the economy of the United States never intended to be covered by the original Act, known as the Wagner Act, or any of its subsequent amendments. This decision should be reviewed as it presents the question of whether or not businesses created by, serving and directly dealing with farmers, farming and the Agricultural Economy as distinguished from the Industrial Economy, are subject to the National Labor Relations Act.

In other words, the decision of this Court should be reviewed for the reason that it presents the question: "Can labor now organize the Agricultural Economy of the United States, under protection of the National Labor Relations Act?"

These questions were raised by brief and argument before the Sixth Circuit Court of Appeals. The members of that Court who were assigned to sit for oral argument openly stated that a question of such basic application of the Act and the intention of Congress as expressed in the Act was for the Supreme Court to decide. Their per curiam decision incorrectly states the questions raised before that Court. The questions actually raised were, as stated in the Petitioner's Brief below, or in the Petition filed below as follows:

> "I. Does the National Labor Relations Act grant jurisdiction to the National Labor Relations Board over Petitioner's business, Petitioner being a non-profit farmers cooperative association (assuming interstate character of business)?

II. Does the National Labor Relations Board have jurisdiction under the National Labor Relations Act over Petitioner's business based on the facts in this case (assuming the National Labor Relations Act grants jurisdiction over non-profit farmers cooperative associations)?"[1]

"C. GROUNDS FOR RELIEF

This petition is filed and the relief herein prayed for is sought for the reason that the National Labor Relations Board, under the National Labor Relations Act, has no jurisdiction over the petitioner and or petitioner's business." (App. p. 132a)

The Circuit Court completely ignored in their decision the basic question raised by Petitioner: "Was the National Labor Relations Act intended to apply to a business directly serving and furnishing services to farmers and directly concerned with the Agricultural Economy?" No court has ever had this question raised or ruled upon this exact question before. No decision of the United States Supreme Court has yet interpreted the Act as it relates to this basic question. The cases cited by the Sixth Circuit Court of Appeals, such as *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755; *N.L.R.B.* v. *Edinburg Citrus Assn.*, 147 F. (2) 353, 354, C.A. 5th; *N.L.R.B.* v. *Central Oklahoma Milk Producers Association*, 285 F. (2) 495, 497, C.A. 10th, do not touch upon this question.

In the decision of the Sixth Circuit Court of Appeals, that Court assumed a congressional intent that the Act should apply to a business such as Petitioner's and merely disposed of and decided the case by finding:

[1] Petitioner's Brief, Court of Appeals.

1.) "Although Petitioner's interstate transactions were a comparatively small part of its over-all business, it was, nevertheless, engaged in commerce within the meaning of the Act."

2.) "The fact that it is a non-profit corporation does not exempt it from jurisdiction under the Act," and

3.) "The employees herein involved worked for the Petitioner's corporation—not for its member farmers. The Petitioner was not engaged in farming and none of its employees were engaged in farming nor performing any work on a farm. Petitioner's employees were not exempt as agricultural laborer," and

4.) "We find no merit in Petitioner's contention that its operations did not satisfy the Board's standards for the exercise of its jurisdiction." (App. to this petition, pp. 1a, 2a and 3a.)

The foregoing indicates that the Sixth Circuit Court of Appeals completely side-stepped the basic question and argument presented to them. They ignored and side-stepped the clear intent of Congress in passing the Act and as expressed in the Act that it was applicable only to businesses in the Industrial Economy, as distinguished from the Agricultural Economy.

The reason that no court decisions can be found on this basic issue of congressional intent is due to the fact that only recently has the Labor Movement, as such, turned toward the organization of farmers cooperative associations, businesses clearly not industrial. The Labor Movement has now practically saturated through organization all businesses in the Industrial Economy under the ever-broadening jurisdictional decisions upheld by the courts. The result is that labor

is now turning to the organization of small businesses created by and designed to provide services for the farmers with whom they deal, businesses clearly in the Agricultural Economy.

The importance of the question here raised is emphasized by realization of the fact that in the State of Ohio alone, there are 80 county farm bureau type cooperative associations organized and existing for the purpose of serving farmers within the state. As of this date, already organizational activities by labor unions have commenced in 2 of them. In addition, there are some 160 other type of farmers cooperative associations in the State of Ohio alone. The business of these farmers cooperatives, like the farmers whom they serve, is seasonal. It is not adaptable to the 40-hour week, time and one-half for overtime, double time on Sunday, paid minimal holidays and what not. When soil needs tilling, crops need planting or crops need harvesting, the farmer works—not hours measured by a clock but by what must be done—so do the county cooperatives and other businesses that directly serve the farmer in performing off-the-farm services.

Congress recognized this when the Wagner Act was passed in 1935. There existed at that time no labor unrest in the Agricultural Economy in this country, but there existed a condition of violent labor unrest and disputes in the Industrial Economy of the country. To these Congress turned its attention, and to these alone it intended the Wagner Act, now the National Labor Relations Act, to apply as the language of the Act clearly indicates (pp. 3-4 of this petition); nor have any of the amendments to the Act changed this basic congressional intent.

Nowhere in the National Labor Relations Act is the term "agricultural" mentioned except to indicate the exclusion of "individuals employed as agricultural laborers." Starting with the National Labor Relations Board Appropriation Act of 1947 and continuing down to date, each appropriation act has expressly prohibited the use of any part of the annual appropriation for the purpose of organizing, assisting in "organizing agricultural laborers, or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers" as referred to in the National Labor Relations Act and as defined in the Section 3 (f) of the Fair Labor Standards Act.[1] This is a further expression of congressional intent that the National Labor Relations Act was not to be applied to farmers or to those engaged in agricultural production. Congress by adding this clear prohibition in each annual appropriation bill has made this abundantly clear!

From the foregoing, it can be seen that the 74th Congress which initially passed the Wagner Act in 1935 and all subsequent Congresses which have amended the Act or passed appropriations for administering to the Act, have very specifically meant to exclude from the operation of the Act "agricultural laborers" and any attempt to organize the agricultural laborers of the United States. The original Act itself evidences no intention to include agricultural employers such as farmers' cooperatives within the definition of "employers" under the Act. Congress, in the Preamble or Purpose Clause to the Act, specifically refers

[1] Public Law 86-703, 86th Congress, 2nd Session, Act of September 2, 1960, Annual Appropriation, National Labor Relations Board.

to "*industrial disputes*" and not once mentions "*agricultural disputes*" or the word "*agricultural industry*" anywhere.

Is there a distinction between *industry* and *agriculture*? We believe that there is! Is there a difference between "industrial strife" and "agricultural strife"? We believe there is! Is there a difference between the "farm problem" and the "industrial problem"? We believe there is!

Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, defines the word "industry", among other definitions, as follows:

> "5 (a) manufacturing productive enterprises *as distinguished from agriculture.*"

This same work defines the word "agricultural" as follows:

> "Of agriculture, pertaining to farming, husbandry, tillage or culture of earth, as agricultural implements or agricultural pursuits."

From the above, it will be seen that the very word "industry", when used in the English language, is used to define a type of enterprise distinguished from agricultural.

This, we submit, is the meaning that must be given the use of the word "industry" in the NLRA. Correct statutory construction requires that such words be given their usual and ordinary meaning. Anything beyond this amounts to administrative or judicial legislation contrary to the constitutional government under which this country operates.

Were any of the Congresses which passed portions of the NLRA thinking and or intending to cover a "nonprofit farmers cooperative association" by the provisions of the Act? We don't believe they were. Their action in specifically prohibiting in their successive bills the expenditure of money for the purpose of organization of agricultural employees refutes any such claim.

There was no history of disputes or strife between employers and employees in the agricultural economy of the country at the time the Wagner Act was passed by Congress. In fact, the same 74th Congress that passed the Wagner Act passed the first *Social Security law on August 14, 1935, P. L. 271, 49 Stat. 620.* This same 74th Congress in *Section 811(b)* of the Social Security Act defined the word "employment" to mean:

> "The term 'employment' means any service, of whatever nature, performed within the United States by an employee for an employer, except,
>
> (1) Agricultural labor; * * * "

As the Court will by judicial notice recall, farmers were not covered under the Social Security Act until it was amended in 1954.

Of what significance is this? *We believe it is indicative of the intention of the 74th Congress to treat farmers, farming and the farm economy as separate and distinct from industry and industrial workers.* Again, we refer to the specific exclusion in the definition of employees covered by the NLRA of "agricultural workers".

The 74th Congress, we submit, did not intend that farmers or agricultural workers or the farm economy

be included within the scope of the NLRA. Accordingly, we contend that it was not the intent of Congress that a collective group of farmers who have organized together pursuant to state law for the purpose of obtaining the benefits of collective purchasing and collectively furnishing farm services through the organization of a statutory non-profit farmers cooperative association, be included under the terms of the Act. No subsequent Congress having amended the law in this regard, the intention of the Congress as expressed in the original Act is still controlling.

If the National Labor Relations Act is going to be held to apply to every business in the United States where a labor dispute can have any possible effect on interstate commerce, then isn't it for Congress to so enact a law rather than for the courts, by judicial legislation, to read into a law an intention that never was expressed or intended? Judicial legislation under the National Labor Relations Act has been a slow spreading cancer upon the United States economy. The danger of such a practice is to deprive the United States citizen of his right through the legislative bodies of this country to enact the laws that govern the country. Legislators must stand for re-election and are accordingly directly responsible to the electorate. Our constitutional fathers intended that laws be enacted by legislative bodies composed of representatives elected by the people, not through judicial legislation by judges appointed for life, who are not responsible to the electorate for re-election.

In the early case of *N.L.R.B.* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, this Court recognizes that Congress did not in passing the National

Labor Relations Act of 1935 intend to cover all industries or all businesses. The following headnotes from the syllabus clearly indicates this:

> "1. The National Labor Relations Act of 1935 (49 Stat. at L. 449, chap. 372, 29 U.S.C.P. 151), prohibiting employers from interfering with, restraining, or coercing employees in self-organization and collective bargaining through representatives of their own choosing, may, notwithstanding its preamble and legislative history, be construed to reach only what may be deemed to burden or obstruct interstate and foreign commerce, and not all industries, and therefore does not invade the reserved powers of the states over their local concerns.
>
> 2. The authority of the Federal Government over interstate commerce may not be pushed to such an extreme as to destroy the distinction which the commerce clause establishes between commerce among the several states and the internal concerns of a state."

It is important that this Court review this case because the rights of the farmer, the last of the rugged-type Americans who settled this great land, are too precious to be eaten away slowly but surely through government and labor control not sanctioned or voted by the people through their representatives. The farmer and the businesses which directly serve him are the last bastion of defense against total labor organization in this country. The farmer today still supplies and controls America's bread basket. The farmer today is the only remaining check and balance on the Labor Movement in this country, the foundation for whose constitutional form of government was the principal of checks and balances between the exec-

utive, judicial and legislative branches. Quit feeding a striker and he won't strike. Take this control away from the farmer by permitting the organization by labor of the businesses with which he deals, which serve him, and on which he depends and labor will have control of him and unlimited control over this country.

These are the reasons that the Supreme Court should review the decision of the court below and announce the law on the basic issue in this case.

> "Does the National Labor Relations Board have jurisdiction over the Lucas County Farm Bureau Cooperative Association, petitioner herein, and accordingly, does the National Labor Relations Board have jurisdiction over businesses created by and serving the farmer by providing off-the-farm services, businesses confined to and dealing directly with the agricultural economy of the United States?"

2. The decision of the Court of Appeals is in conflict with other decisions of this court and of other courts of appeals

The decision of the Court of Appeals indicates that the court made factual findings as a basis of jurisdiction over the business of the petitioner, not found by the National Labor Relations Board. Accordingly, their decision rendered in this case is in conflict with recognized decisions of this Court and other courts of appeals.

The National Labor Relations Board did not base its finding of the interstate character of petitioner's business upon the sale of $187,000.00 worth of grain sold outside the State of Ohio as the court did. (App. 15a, 99a, 128a).

The Sixth Circuit Court of Appeals expressly found

"during the same fiscal year petitioner sold $255,120.00 worth of grain; $187,000.00 of which was sold to a grain marketing cooperative outside the State of Ohio, of which petitioner was a member." (App. this petition, p. 2a). This was not the fact nor was it the basis of the National Labor Relations Board asserting jurisdiction in this case! The National Labor Relations Board concluded the evidence as to the $34,000.00 worth of coal and lumber indicated the interstate aspects of the petitioner's business. (App. 99a, 128a).

The Court of Appeals had no power on this appeal from an administrative agency to weigh the evidence and make factual conclusions contrary to the National Labor Relations Board in a case such as this where there was substantial evidence to support the conclusion of the Board. The evidence relating to the sale of grain outside the State of Ohio was substantial and led to the conclusion that these sales were *not* the sales of the cooperative, but of the individual farmers as the Board must have concluded since they did not endeavor to assert jurisdiction based on these interstate sales. (App. 52a-55a).

This action of the Court of Appeals in making a basic factual conclusion that the National Labor Relations Board did not make, is contrary to the well recognized law as announced by this Court and other courts of appeals and is in conflict with the Administrative Procedure Act and the National Labor Relations Act itself. (*N.L.R.B.* v. *Pa. Greyhound Lines*, 303 U.S. 261, 270; 82 L. Ed. 831, 837, 58 Sup. Ct. 571; *N.L.R.B.* v. *Piedmont Cotton Mills*, 179 F. (2) 345, C.A. 5th; *DeGorter* v. *Federal Trade Commission*, 244 F. 2d 270; *U. S. Ex. Rel., Chapman* v. *Federal Power*

Commission, C.A. 4th (1951), 191 F. 2d 796, Affm., 73 Sup. Ct. 609, 345 U.S. 153, 97 L. Ed. 918; *Swayne & Hoyt v. The United States,* 300 U.S. 297, 81 L. Ed. 659 & 57 Sup. Ct. 478; Title 5 U.S.C., Sec. 1009, Title 29 U.S.C., Sec. 160(e).).

This case should be reviewed by the Supreme Court, if for no other reason than to correct this obvious error on the part of the Sixth Circuit Court of Appeals in making this factual finding as to the interstate character of the petitioner's business contrary to the finding and conclusion of the National Labor Relations Board.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14333

LUCAS COUNTY FARM BUREAU COOPERATIVE ASSOCIATION, Monclova Road, Maumee, Ohio, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition to Review and Set Aside, and on Cross Petition for Enforcement of, an Order of the National Labor Relations Board.

Decided May 10, 1961.

Before: MILLER, Chief Judge, MARTIN and MCALLISTER, Circuit Judges.

PER CURIAM. The petitioner seeks to set aside an order of the National Labor Relations Board issued August 5, 1960. The Board in its answer seeks enforcement of the order.

The petitioner is a farmers' cooperative association, incorporated under the laws of Ohio, doing business in Lucas County, Ohio, and engaged in the marketing of grain and processing seed and feed for its members. It also sells retail to its members and to the public certain farm supplies, such as feed, seed, fertilizer, and spray materials. During the fiscal year 1958, in connection with its opera-

tion, petitioner purchased approximately $34,000,00 worth of coal and lumber from outside the State of Ohio. During the same fiscal year petitioner sold $255,120,00 worth of grain, $187,000,00 of which was sold to a grain marketing cooperative outside the State of Ohio, of which petitioner was a member. Petitioner employed 22 employees, including truck drivers, ware housemen and yardmen. Petitioner, as distinguished from its members, does not engage in any farming operations.

The Board found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to recognize and bargain with the union, the certified majority representative of its employees, and by individually dealing with employees and effecting unilateral changes in conditions of employment without prior consultation with the union. It entered a cease-and-desist order based on those findings.

Petitioner contends that the Board improperly asserted jurisdiction over its operation, in that (1) it was not engaged in commerce within the meaning of the Act; (2) that the employees in the unit for which the union was certified were "agricultural laborers" excluded from the coverage of the Act; and (3) that its operations did not satisfy the Board's standards for the exercise of its jurisdiction.

Although petitioner's interstate transactions were a comparatively small part of its overall business, it was, nevertheless, engaged in commerce within the meaning of the Act. *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1, 3; *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601, 606-607; *N. L. R. B.* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 683-685. The fact that it is a nonprofit corporation does not exempt it from jurisdiction under the Act. *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 128-129.

The Act is not applicable to "any individual employed as an agricultural laborer." *Sec. 203 of the Act; Sec. 152(3), Title 29, U. S. Code.* However, the employees herein involved worked for the petitioner corporation, not for its member farmers. The petitioner was not engaged in farming and none of its employees were engaged in farming or performed any work on a farm. Petitioner's employees were not exempt as agricultural laborers. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U. S. 755; *N. L. R. B. v. Edinburg Citrus Assn.*, 147 F. (2) 353, 354, C. A. 5th; *N. L. R. B. v Central Oklahoma Milk Producers Association*, 285 F (2) 495, 497, C. A. 10th.

We find no merit in petitioner's contention that its operations did not satisfy the Board's standards for the exercise of its jurisdiction. If jurisdiction exists under the Act, the extent to which that jurisdiction will be exercised is a matter of administrative policy within the discretion of the Board. *N. L. R. B. v. Denver Building & Construction Trades Council*, supra, 341 U. S. 675, 684; *N. L. R. B. v. F. M. Reeves and Sons, Inc.*, 273 F. (2) 710, 711-712, C. A. 10th; *N. L. R. B. v. W. B. Jones Lumber Co.* 245 F. (2d) 388, 390, C. A. 9th.

The petition to set aside the Board's order is denied, and a decree of enforcement will be entered

Judgment

May 10, 1961

On petition to review and set aside the decision and order of the National Labor Relations Board of August 5, 1960, and request for enforcement of said order filed by the National Labor Relations Board,

This cause came to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel for petitioner.

On Consideration Whereof, It Is Now Ordered, Adjudged and Decreed by this Court that the petition to set aside the Board's order to be and the same is denied, and a decree of enforcement is herewith entered.

Approved for entry:

/s/ Shackelford Miller, Jr.
Chief Judge

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FILED
JUL 17 1961
JAMES R. BROWNING, Clerk

No. 152

In the Supreme Court of the United States

OCTOBER TERM, 1961

LUCAS COUNTY FARM BUREAU COOPERATIVE ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–3a) is not yet reported. The decision and order of the National Labor Relations Board (R. 97a–130a)[1] are reported at 128 NLRB No. 56. The Board's representation determination, which forms the basis for that decision and order, is set forth at R. 15a–17a.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1961 (Pet. 4a). The petition for a writ

[1] "R." refers to the Joint Appendix filed with the court below.

of certiorari was filed on June 16, 1961. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the petitioner, a farmers' cooperative association, was engaged in commerce within the meaning of the National Labor Relations Act, and that its employees were not agricultural laborers excluded from the Act's coverage.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pages 2–5 of the petition.

STATEMENT

1. *The business of the petitioner.*—The petitioner, a farmers' cooperative association, is engaged in Ohio in the marketing of grain and the processing of seed and feed for its members (R. 15a, 99a; 48a–49a, 51a, 70a). It also sells at retail to its members and to the public certain farm supplies such as feed, seed, fertilizer, and spray materials (R. 15a, 99a; 51a, 59a, 69a–70a). During the fiscal year 1958, the petitioner's retail supply sales totaled $982,127 (R. 51a, 73a). In connection with these sales, the petitioner purchased at least $34,500 worth of goods from outside Ohio (R. 15a, 99a; 57a, 58a–59a). During the same fiscal year, the petitioner sold $255,120 worth of grain (R. 51a), $187,000 of which was sold to a grain marketing cooperative outside Ohio, of which the petitioner was, in turn, a member (R. 54a, 60a–61a, 63a, 73a). Of the $187,000 representing grain sales to the parent cooperative, $35,000 to $40,000 worth consisted

of grain delivered by the petitioner itself to the parent cooperative and the remainder represented grain delivered by the farmers who were compensated by the petitioner after it, in turn, was paid by the parent cooperative (R. 52a–53a, 54a–55a, 61a–64a). The farmers could not sell directly to the petitioner's parent cooperative but were required to go through one of the member elevators (R. 55a). The petitioner has 22 employees, including truckdrivers, warehousemen and yardmen (R. 105a; 41a, 49a). It is conceded that the petitioner, as distinguished from its members, does not engage in any farming operations (R. 65a).

2. *The representation proceeding.*—On January 21, 1959, Local 58, American Federation of Grain Millers, AFL–CIO ("the Union"), filed a petition for certification pursuant to Section 9(c) of the National Labor Relations Act (R. 103a; 11a–14a, 76a). Thereafter, a representation hearing was held in which the petitioner contested the Board's jurisdiction over its operations. On April 7, 1959, the Board issued its "Decision and Direction of Election" in which it found that the petitioner was engaged in commerce within the meaning of the Act, that the volume of the petitioner's retail business met the Board's standard for the assertion of jurisdiction over retail enterprises, and that it would effectuate the purposes of the Act to assert jurisdiction over the petitioner (R. 103a–104a; 15a–17a). The Board directed an election in a unit which it found to be appropriate, consisting of the petitioner's truckdrivers, yardmen, warehousemen, mill grain department employees and

plant clerks in all three of its plants (R. 105a; 16a–17a). The election, conducted by mail between April 27 and May 7, 1959, was won by the Union by a vote of 11 to 3 (R. 105a; 17a–18a, 20a). Thereafter, on June 22, 1959, after due consideration of the petitioner's objections to the election (R. 106a–107a; 19a–20a, 21a–22a, 24a–26a, 28a–32a), the Board certified the Union as the majority representative of the petitioner's employees in the bargaining unit (R. 106a; 28a).

3. *The unfair labor practice proceeding.*—Following the Board's certification, the Union at various times requested the petitioner to negotiate a contract (R. 109a–114a; 32a–34a, 36a, 43a, 80a–81a, 95a–96a). The petitioner admittedly refused to meet and bargain with the Union (R. 110a–111a, 114a, 125a, 128a; 43a, 95a–96a).[2] In addition, the petitioner entered into individual contracts with two employees in the bargaining unit, changing the terms and conditions of their employment (including the basis of computing their compensation, and the sick leave and vacation benefits theretofore received by them), without prior consultation with the Union (R. 116a, 125a, 128a; 37a–40a, 84a–87a, 88a, 91a, 94a–95a).

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[2] In a letter to the Union dated September 3, 1959, the petitioner advised the Union that "the company is not disposed to meet and negotiate with you on any labor contract until the action we filed in the Federal District Court in July questioning the jurisdiction and procedures before the National Labor Relations Board has been disposed of" (R. 114a; 36a–37a). In the District Court action (Civil Action 8253, N.D. Ohio), the petitioner sought to enjoin the Board from conducting the unfair labor practice proceeding. On December 15, 1959, the district court dismissed the complaint for lack of jurisdiction (R. 108a; Pet. 11).

The Board found that the petitioner's refusal to negotiate and bargain with the Union, as well as its individual dealings with the employees, constituted a violation of Section 8(a)(5) and (1) of the Act (R. 125a, 128a). The Board also reaffirmed its prior determination in the representation proceeding that the petitioner's operations were subject to its jurisdiction (R. 99a, 124a). The Board ordered the petitioner to cease and desist from the unfair labor practices found, to bargain collectively with the Union upon request, and to post appropriate notices (R. 129a–130a).

4. *The decision of the court of appeals.*—The court of appeals held that the Board had statutory jurisdiction over the petitioner's operations, and that "the extent to which that jurisdiction will be exercised is a matter of administrative policy within the discretion of the Board" (Pet. 1a–3a). The court enforced the Board's unfair labor practice order.

ARGUMENT

The petitioner concedes that it has refused to recognize and bargain with the Union. Its sole defense to the Board's Section 8(a)(5) order is that the Board improperly asserted jurisdiction over its operations. The petitioner's contention is insubstantial and thus presents no question warranting review by this Court.

It is well settled that the Board's jurisdiction under the National Labor Relations Act reaches to the full extent of the power of Congress under the Commerce Clause. *Guss* v. *Utah Labor Board*, 353

U.S. 1, 3; *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 606–607. As shown above, during the fiscal year 1958, the petitioner purchased materials valued at about $34,500 from outside the State of Ohio and sold products valued at $187,000 outside that State. This volume of interstate commerce is clearly sufficient to give the Board jurisdiction over the petitioner's operations.[3]

Nor is a different conclusion required by the petitioner's contention (Pet. 13–22) that its employees are "agricultural laborers," exempt under Section 2(3) of the Act.[4] The employees in the unit for which the Union was certified, namely, truckdrivers, yardmen, warehousemen, mill grain department employees, and plant clericals, worked for the petitioner cooperative and not for its member farmers. None of the employees performed any work on a farm. Since the cooperative itself does no farming and is not engaged in farming activities (R. 65a), none of the employees may be said to have engaged in farming or work incidental thereto performed on a farm or by a farmer. The necessary requisite for "agricultural

[3] There is no merit to the petitioner's argument (Pet. 2, 22–24) that the court below sustained the Board's jurisdiction upon the basis of facts not found by the Board. Since the Board found that the petitioner's purchase of $34,500 worth of goods from outside Ohio was alone sufficient to confer jurisdiction (R. 15a), there was no need for the Board to note that the $187,000 outflow of goods would also have afforded a basis for jurisdiction. However, as this additional commerce data is found in the undisputed testimony of the petitioner's own manager and in the petitioner's stipulation as to the competency and accuracy of the data (R. 48a, 51a, 52a–53a, 57a–64a, 73a), the court could properly refer to it in sustaining the Board's ultimate conclusion.

[4] Section 2(3) of the Act provides that the term "employee" shall exclude "any individual employed as an agricultural

laborer" status is thus lacking here. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755; *National Labor Relations Board* v. *Central Oklahoma Milk Producers Association*, 285 F. 2d 495, 497 (C.A. 10).[5]

The petitioner's suggestion that Congress intended to exclude all enterprises within the "Agricultural Economy" (Pet. 15–16) from the coverage of the Act overlooks the fact that the statutory exemption is specifically limited to the "agricultural laborer," and, as shown above, the petitioner's employees do not fall within the meaning of that term. However, even if the petitioner's distinction between "agriculture"

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laborer." Since 1946, the annual appropriation acts for the Board have regularly carried a rider which provides that the term "agricultural laborer" in Section 2(3) shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act. This latter provision reads in pertinent part as follows:

"'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

[5] See also, *Puerto Rico Tobacco Marketing Coop. Assn.* v. *McComb*, 181 F. 2d 697, 700-701 (C.A. 1); *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, 267 F. 2d 286, 290 (C.A. 5); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. 2d 76, 79–81 (C.A. 9); *Walling* v. *McCracken County Peach Growers Assn.*, 50 F. Supp. 900, 904 (W.D. Ky.). These and the cases cited in the text also demonstrate that the Board's jurisdiction is not lost merely because the petitioner may be a non-profit organization, or its members are farmers.

and "industry" (Pet. 18) be accepted *arguendo,* it is clear that "When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry'." *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board,* 109 F. 2d 76, 80 (C.A. 9). Thus, even under the petitioner's own theory, it is part of the industrial rather than the agricultural economy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1961.